

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Lucas State Office Building
Des Moines, Iowa 50319

ELECTRONICS RESEARCH INC
BILL HARLAND
7777 GARDNER RD
CHANDLER IN 47610

DOCKET NO. 05DASG035

Appellant,

DECISION

DEPT OF ADMINISTRATIVE SERVICES,

Respondent.

STATEMENT OF THE CASE

This matter came on for hearing on the 31st day of October, 2005, before Administrative Law Judge John M. Priester. Bill Harland represented the Appellant and Assistant Attorney General Shauna Shields represented the Respondent Agency. The Agency called as witnesses Paul Ollinger, Assistant Director of Engineering Transmission with Iowa Public Television; and Ashley Super, Purchasing Agent III with the Respondent Agency.

FINDINGS OF FACT

Iowa Public Television's signal tower in Ottumwa, Iowa, needs to be replaced. A transmitter from Kirksville, Missouri is interfering with the channel 33 signal for IPTV in that area. To rectify the problem, and help make the transformation to digital transmission, IPTV began the process to seek competitive bids for the construction of a new transmission tower.

The Department issued RFP No. BD805005S358 on June 29, 2005 for the designing and building a new broadcasting tower at Ottumwa, Iowa.

IPTV has experienced problems in the past with weather-related delays. On prior construction contracts IPTV has been required to pay substantial amounts to the winning bidder when weather related delays occurred. To insure that these budgetary problems were not repeated, IPTV determined that there would be no weather-related delay payments.

To address IPTV's concerns about weather-related delay payments, the Department addressed this in Addendum Two. The addendum provides the following question and answer:

Q16: RE: There is no delivery specified in the bid. What is IPTV's desired delivery and what is the expected time for an order from the bid date. How will the completion date be affected by possible delays due to winter weather and will IPTV pay for weather delays?

A: Due to signal incursion from a digital transmitter in Northern Missouri this facility is effectively nonfunctional and can not be functional until the new tower and broadcast antenna tuned to the new frequency are in place. . . .

Iowa Public Television understands that there may be weather delays during this project. However, **AT NO TIME WILL IOWA PUBLIC TELEVISION INCUR COST FOR WEATHER DELAYS.**

Amendment Two to RFP #BD80500S358, page 4 of 5. (emphasis in original).

This RFP was to be evaluated in two parts. The first evaluation was to be made by the reviewing committee of the Technical Proposal. After the Technical Proposals have been scored the Cost Proposals were to be opened and evaluated. The highest competent bidder would be awarded the contract.

The RFP provided that the State reserved the right to make a written request for an oral presentation of additional information from bidding vendors to clarify proposals. However, information received that would materially alter the contents of the original proposal would not be considered. The RFP also provided that "Exceptions that materially change these terms or the requirements of the RFP may be deemed non-responsive by the Department, resulting in disqualification of the proposal." (Ex. 3, RFP § 2.1).

Four vendors responded to the RFP with proposals. The bidders were Radian Communications, Precision Communications Inc., Sabre Communications Corp. and the Appellant.

The Appellant's technical proposal provided that "Weather delays will be charged at \$450.00 per man per day." (Ex. 5, p. 12). The Appellant's proposal also contained the required Proposal Certification. In this certification, the Appellant certified that it was agreeing to the "specific terms, conditions and technical specifications required in the attached Request for Proposal BD80500S358 and offered in the vendor's appeal." (Ex. 5, Attachment 1).

At the evaluation stage the evaluating committee scored the technical proposals. The committee found that the Appellant's inclusion of weather cost delays of \$450 per person per day was a material breach of the RFP. The committee determined that "In accordance with RFP Section 1.8, ERI was disqualified early in the evaluation because their proposal included weather days at extra charges to IPTV which was specifically prohibited per Amendment Two, line Q16: 'AT NO TIME WILL IOWA PUBLIC TELEVISION INCUR COST FOR WEATHER DELAYS.' ERI's Cost proposal was not opened." (Ex. 14).

In the hearing the Appellant testified that the inclusion of the weather delay cost was in error. Mr. Harland testified that this was standard boilerplate that is used in other similar contracts. It was a clerical error and should have been disregarded in light of the Appellant's certification that it would comply with all the requirements of the RFP.

The Appellant believes that it was the Department's responsibility to inquire about the questions that arose as a result of the inclusion of the language concerning weather delay costs. The Appellant pointed out that the Department did contact the Appellant to inquire about specifics concerning its technical proposal. The Department responded by indicating that it would not have been appropriate to ask for clarification of this question, because if the weather delay cost clause were eliminated it would have materially altered the proposal.

Sabre Communications Corp. provided the successful proposal. The Notice of Intent to Award was transmitted on September 2, 2005. The Appellant filed a timely appeal of this Intent to Award challenging the evaluation committee's decision to disqualify the Appellant's proposal.

CONCLUSIONS OF LAW

Iowa law requires that the Director of the Department of Administrative Services promulgate rules establishing competitive bidding procedures. Iowa Code § 8A.311. This code section requires that "[a]ll equipment, supplies, or services procured by the department shall be purchased by a competitive bidding procedure." Iowa Code § 8A.311(1).

The code also requires "[c]ontracts for the purchase of items shall be awarded on the basis of the lowest competent bid." Iowa Code §

8A.311(3)(a). The Respondent agency promulgated administrative rules governing competitive bidding. See 581 IAC Chapter 105.

Under Iowa Code Chapter 17A, a presiding officer, or reviewing court, will:

[g]rant relief where substantial rights of a party have been prejudiced because the agency action is in excess of the agency's statutory authority, is unsupported by substantial evidence, is unreasonable, arbitrary, or capricious, or is affected by other error of law.

Dico, Inc. v. Iowa Employment Appeal Board, 576 N.W.2d 352, 354 (Iowa 1998).

The burden of proof to establish that the agency acted improperly is with the Appellant. Iowa Code § 17A.19(8)a. The issue to be determined then is whether the Appellant has established that the Respondent agency acted improperly in disqualifying the Appellant's proposal. The Appellant therefore has the burden to establish that the Respondent acted unreasonably, arbitrarily or capriciously in finding that the Appellant's proposal was materially noncompliant.

The Iowa Supreme Court has issued a decision on a case regarding competitive bidding. See Master Builders, Inc. v. Polk Co., 653 N.W.2d 382 (Iowa 2002). The Court was interpreting Iowa Code section 384.99 that states "[t]he contract for the public improvement must be awarded to the lowest responsible bidder." The Court held that "the inclusion of the word *responsible* in the standard for awarding contracts implies a measure of discretion on the part of the political subdivision in its consideration of what bid to ultimately accept for a project." Id. at p. 394 (emphasis in original).

The RFP at issue in this case "is to solicit proposals from qualified bidders for the turnkey design, fabrication, and installation of the tower and related foundations of a new broadcasting tower at Ottumwa, Iowa for Iowa Public Television." (Ex. 3, RFP Section 1.1).

The Respondent has the discretion to set the parameters of the RFP. The decision to prohibit weather delay costs was clearly within the Agency's discretion. To then disqualify the Appellant for including weather delay costs of \$450 per person per day was in conformance with this RFP is also clearly within the Agency's authority. The Agency had no way to know that the inclusion of the weather delay costs was in error.

After reviewing the file and the testimony introduced at the hearing, the undersigned finds that the Respondent agency was acting within its discretion in disqualifying the Appellant's proposal for including a weather delay cost. The Appellant has failed to establish that the Respondent's decision was unreasonable, arbitrary, or capricious, or affected by other error of law.

DECISION

The decision of the Respondent in disqualifying the Appellant's proposal as being in nonconformance is hereby AFFIRMED.

DATED THIS 7th DAY OF NOVEMBER 2005.



JOHN M PRIESTER
ADMINISTRATIVE LAW JUDGE

CC: BILL HARLAND
ELECTRONIC RESEARCH INC.
7777 GARDNER ROAD
CHANDLER IN 47620-9219

SHAUNA SHIELDS, AAG

ASHLEY SUPER, DGS

BETTY MAXWELL, DIA

This decision shall be final, unless within fifteen (15) days from the receipt of this Order, you or any interested party appeal to the Director of the Department of General Services, Hoover Building, A Level, Des Moines, Iowa 50319-0104, clearly stating the grounds upon which such appeal is based.